Edward Z. Holmes Detective Bureau, Inc. *and* Allied International Union of Security Guards and Special Police. Case 2-CA-16730

June 23, 1981

DECISION AND ORDER

On December 18, 1980, Administrative Law Judge Steven B. Fish issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

We agree with the Administrative Law Judge's finding that substantial evidence supports the General Counsel's allegations that Respondent refused to provide, upon the Union's request, "various items of information and records, all clearly relevant to the Union's performing its function of determining the accuracy of Respondent's compliance with various aspects of the contract," and that Respondent "did not have any intention of entering into good faith bargaining for a new contract with the Union." However, we do not agree with his further finding that, notwithstanding Respondent's behavior which violated Section 8(a)(5) and (1) of the Act, the complaint should be dismissed because the Union's conduct rose "to the level of sufficient bad faith, so as to preclude the existence of a situation in which Respondent's good faith can be tested."

The Administrative Law Judge based his conclusion that the Union's conduct precluded a finding of violation by Respondent primarily on the credited testimony of Respondent President Tavlin that Union President Cunningham stated several times that Cunningham would put Respondent out of business. Although the statements attributed to Cunningham were intemperate, they did not free Respondent from its obligations under the collective-bargaining agreement or under the Act.[1] For as long as 2-1/2 years leading up to Cunningham's first abusive statements, Respondent admittedly disregarded its obligations. Not only did Respondent fail to make appropriate payments to the Union's health and welfare fund on behalf of its employees, but it did not even report the hire of new permanent employees as required by the contract.[2] Moreover, when Cunningham confronted Tavlin with allegations that Respondent was not fulfilling its obligations, Tavlin simply responded that he did not have the money and did not even attempt to justify his failure to at least report new hires. In these circumstances, we find that Cunningham's reply that he would put Respondent out of business was provoked by Respondent's misconduct, and therefore is no defense to Respondent's refusal to bargain. See, for example, *Alba-Waldensian, Inc.*, 167 NLRB 695, 697 (1967), enfd. 404 F.2d 1370 (4th Cir. 1968).

Talvin's subsequent refusal to respond to the Union's legitimate requests for the information about new hires and his unexplained failure to appear at the arbitration hearing involving Respondent's failure to pay the contractually required sums further displayed a flagrant disregard of the Union's representative status. Inasmuch as Respondent's pattern of behavior began before any intemperate conduct by Cunningham—and indeed continually provoked it—it cannot be fairly concluded that Cunningham's behavior made it impossible to test Respondent's good faith.

Rather, Respondent's conduct was deficient throughout. Not only did Respondent ignore its reporting and financial obligations under the contract and the Union's requests that those obligations be met, but, following its announcement to the Union that it did not wish to renew the contract upon the June 5, 1979, expiration date, it did not respond to union requests to begin negotiations (first made on May 17) until June 27, following the Union's filing of an unfair labor practice charge against Respondent alleging, *inter alia*, Respondent's failure to bargain for a new contract. And while two negotiating sessions were held in July, Respondent's positions at that time included insistence upon elimination of part-time workers from contract coverage (although they had been part of the unit for at least 6 years) and total elimination of contributions to the health and welfare fund. While Respondent's positions at the July meetings did not, by themselves, demonstrate bad faith, that behavior, in the context of all that came before, was further indication of bad faith which cannot be attributed to the Union's behavior.[3]

[1] In any event, while an employer may, in certain circumstances, refuse to deal with a *particular* union representative where the latter has engaged in violent or other abusive conduct (*Fitzsimons Manufacturing Company, West Branch Tube Division*, 251 NLRB 375 (1980)), Respondent here at no time so limited its refusal.

[2] If Respondent was unable to make the payments due to alleged "cashflow" problems, it could have so stated to the Union, and attempted to work something out. Instead, it simply ignored its responsibility to inform the Union that new employees had been hired.

[3] Following the issuance of the instant complaint in October 1979, Tavlin wrote to the Union, requesting a negotiating session on December 5. While the credited testimony revealed that the Union simply read off its contract proposals, asked Tavlin if he would sign, and, upon getting a negative response, left, this incident did not exculpate Respondent. Indeed, there is no evidence that prior to the meeting Tavlin gave any indication that he was prepared to provide the information necessary for the Union to enforce the provisions of the expired contract. In light of

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Further, any fear on the part of Respondent with respect to Cunningham's statements that he would put it out of business would be sheer speculation. Indeed, the Union's bargaining behavior in the spring and summer of 1979 did not display such a motive: There is no indication that its bargaining proposals were out of line with those made to other employers in the industry, or that Union Representative Jaffe's positions at the July negotiating sessions were not set forth in good faith. See *Reisman Bros., Inc.*, 165 NLRB 390, 392-393 (1967), enfd. 401 F.2d 770 (2d Cir. 1968).[4] Nor can it be said that Cunningham's behavior evinced a conflict of interest even remotely similar to that found in *Bausch & Lomb Optical Company*, 108 NLRB 1555 (1954). There, the Board found that the employer was not obligated to bargain with a union which had set up a business which competed with that employer. The concern in *Bausch & Lomb* was that union financial interest in a competitor could too easily cause the union to gear its bargaining to cripple the competition rather than advance the interests of the employees. But no such danger is presented here. Nothing in the record supports a conclusion that Cunningham or the Union had any motive to destroy Respondent, or that Cunningham or the Union were engaged in any such effort. Compare *Knoxville Publishing Company*, 12 NLRB 1209, 1233-34 (1939).[5]

In sum, the Union's behavior did not free Respondent from its obligation to bargain in good faith with the duly designated representative of its employees. Accordingly, we find that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide information to the Union that was relevant to the Union's performance as the exclusive bargaining representative of its employees, and that Respondent further violated Section 8(a)(5) and (1) by failing and refusing to bargain in good faith for a new contract.

CONCLUSIONS OF LAW

1. Respondent Edward Z. Holmes Detective Bureau, Inc., is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Allied International Union of Security Guards and Special Police is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to provide information to the Union that was relevant to the Union's performance as the exclusive bargaining representative of its employees, Respondent has violated Section 8(a)(5) and (1) of the Act.

4. By failing and refusing to bargain in good faith with the Union for a new contract, Respondent has violated Section 8(a)(5) and (1) of the Act.

5. Respondent's violations of Section 8(a)(5) and (1) of the Act are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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this continuing failure of Respondent to meet the simplest requirements of the law, we will not hold that the Union's response—however abrupt—was unprovoked. In any event, even if this continuing disregard of the Act did not provoke the Union's December 5 conduct, Tavlin's failure, prior to the meeting, to offer the requested information precludes a conclusion that he had decided to obey the law or that the Union's conduct made it impossible to test his good faith.

[4] Indeed, when Jaffe was confronted by Tavlin on July 11 with Internal Revenue Service warrants indicating that Respondent was in difficult financial straits, he suggested that the Union might be able to put welfare payments on the "backburner." While Jaffe withdrew this suggestion on July 18, this withdrawal must be viewed in light of the fact that, as Tavlin himself admitted, the balance due the IRS had been essentially constant since 1973.

Nor does the fact that the Union escalated its demands between its April and May contract proposals indicate bad faith on the part of the Union. Such a tactic is not at all foreign to hard-fought negotiations. See *Chambers Manufacturing Corporation*, 124 NLRB 721, 725 (1959), enfd. 278 F.2d 715 (5th Cir. 1960).

[5] In view of Tavlin's claims of poverty, Cunningham's statements that he would put Respondent out of business appear to be related to the efforts to collect moneys owed the Union's health and welfare fund. Given Cunningham's obvious distrust of Tavlin's claims, these "*threats*" were not only provoked, but may well have been facetious. In any event, the fact that union representation of several competing employers may lead to situations in which enforcement of agreements may result in the demise of weaker employers is not a basis for refusals to bargain or to adhere to agreements. The Congress explicitly rejected such potential conflicts as a basis for denying certification in 1947. See Legislative History of the Labor Management Relations Act, 1947, 187-188, 300, 550-551 (G.P.O. 1974).

The Administrative Law Judge also found that Tavlin's credited testimony that Cunningham referred to unit employees in racist terms demonstrated lack of concern for the employees. Viewing the statement in context, however, we do not agree: When Tavlin first asserted that he did not have the money to make the required health and welfare fund payments, the credited response by Cunningham was, "Who do you think you are talking to, those f—ing jigs you got working for you?" Cunningham's reply was, in essence, that the employees might believe what Tavlin was saying, but that he did not. Thus, Cunningham, while displaying an appalling level of bigotry and a low opinion of the employees, did not demonstrate lack of concern; rather, he was vociferously defending their economic interest.

The Administrative Law Judge concluded that the Union evidenced bad faith by being primarily concerned with collecting moneys owed the health and wealth fund. We do not agree. No doubt this was a primary concern, but this was entirely proper, since without such payments the Union could not provide welfare coverage for the employees. In any event, contrary to the Administrative Law Judge, the record reveals that the Union did attempt to engage in negotiations for a new contract, an attempt which was thwarted by Respondent's bad faith.

Finally, Cunningham's apparent fabrication of a section of the contract submitted to an arbitrator, while undoubtedly disgraceful, does not affect the outcome here. The fabricated section did not relate to Respondent's obligations under the contract with which Respondent admittedly failed to comply. Rather, it went to the jurisdiction of the arbitrator. Further, since Respondent failed to participate in the arbitration proceeding and the arbitrator's decision did not issue until July 17—after most of the unlawful behavior of Respondent occurred—the discrepancy between the contract and the section apparently provided by the Union could not have had any impact upon that behavior, and thus cannot be deemed to have been union conduct making a test of good faith impossible.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. Specifically, as we have found that Respondent has unlawfully failed to provide certain information to the Union that was relevant to the Union's performance as the exclusive representative of its employees, we shall order that Respondent furnish, upon request of the Union, the names of all employees in the recognized bargaining unit, their addresses, dates of hire and/or termination, and the jobsites where they were employed by Respondent since June 6, 1976. Furthermore, as we have found that Respondent has unlawfully failed to bargain in good faith with the Union for a new collective-bargaining agreement, we shall order that Respondent bargain with the Union in good faith.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Edward Z. Holmes Detective Bureau, Inc., New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith concerning rates of pay, wages, hours, and other terms and conditions of employment with the Allied International Union of Security Guards and Special Police as the exclusive representative of the employees in the following appropriate unit:

> All full- and part-time security guards employed by Respondent, excluding office clerical employees, non-guards, and supervisors as defined in the Act.

(b) Refusing to provide to said Union information relevant to the Union's performance as the exclusive representative of its employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of any right guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

(a) Upon request, provide to the aforementioned Union the names of all unit employees, their addresses, dates of hire and/or termination, and the jobsites where they were employed by Respondent since June 6, 1976.

(b) Upon request, bargain in good faith with said Union representing the aforementioned unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Post at its place of business in New York, New York, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by a representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board having found, after a hearing, that we violated the National Labor Relations Act, as amended, we notify you that:

> WE WILL NOT refuse to bargain in good faith with the Allied International Union of Security Guards and Special Police as the exclusive representative of our employees in the unit described below:
>
> All full- and part-time security guards employed by us, excluding office clerical employees, non-guards, and supervisors as defined in the Act.
>
> WE WILL NOT refuse to provide to said Union information (including the names of unit employees, their addresses, dates of hire and/or termination, and the jobsites where they were employed since June 6, 1976) relevant to its performance as the exclusive representative of the aforementioned employees.
>
> WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in

the exercise of any right guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL, upon request, bargain in good faith with the aforementioned Union with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, WE WILL embody such understanding in a signed agreement.

WE WILL, upon request, provide to said Union information relevant to its performance as the exclusive representative of the aforementioned employees.

EDWARD Z. HOLMES DETECTIVE BUREAU, INC.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge: Pursuant to charges and amended charges filed by Allied International Union of Security Guards and Special Police, herein called the Union or the Charging Party, a complaint and notice of hearing was issued by the Acting Regional Director for Region 2 against Holmes Detective Bureau, Inc.,[1] herein called Respondent, on October 26, 1979.[2] The complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain with the Union, and by failing and refusing to supply the Union with various items, materials, and information requested by the Union; which information is necessary for and relevant to the Union's performance of its functions as the exclusive collective-bargaining representative of the employees of Respondent.

A hearing was held before me on May 5 and 6, 1980. Briefs have been filed by the General Counsel and Respondent and have been duly considered.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a New York corporation engaged in the business of providing security services to customers located in the State of New York. During the past year, Respondent provided services valued in excess of $50,000 for other enterprises located within the State of New York, including New York Institute of Technology, Fifth Avenue Diamond Exchange, Miltex Distributing Corp., and John Rau Management Corp. Each of said enterprises is directly engaged in interstate commerce, meeting a Board standard, exclusive of indirect outflow or indirect inflow, for the assertion of jurisdiction. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is an organization formed with a purpose of negotiating benefits and working conditions with employers, on behalf of the employees whom it represents. Employees participate in the affairs of the organization, by attending meetings, and in connection with the conduct of negotiations with employers. I therefore find that the Union is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

In June 1973, Respondent voluntarily recognized the Union and entered into a collective-bargaining agreement with it, running from June 6, 1973, to June 5, 1976. The parties entered into a renewal contract running from June 6, 1976, to June 5, 1979. The unit specified in the contract is all security employees, excluding office, clerical, nonguards, and supervisory employees, as defined in the Act. The recognition clause makes no distinction between or reference to part- or full-time employees. It is clear, however, that the contract applies to both full- and part-time employees. The contract itself contains a reference in the welfare payment schedule clause (art. XXI) to different payments for full- and part-time employees, and a definition of a full-time employee as one who works a regularly scheduled 24 hours per week or more. In addition, the evidence reveals that the contract was applied to both full- and part-time employees.

Accordingly, I find that Respondent has recognized the Union in a unit consisting of all full- and part-time security guards, excluding office clerical employees, nonguards, and supervisors as defined in the Act.

Respondent denies the appropriateness of the above-described unit and exclusive representative status of the Union, and asserts that the General Counsel has not met his burden of establishing these allegations of the complaint.

However, having voluntarily recognized the Union as the exclusive representative of its employees in a bargaining unit for several years, Respondent cannot now attack the Union's majority status among its employees or the appropriateness of the unit.[3]

The past contracts and the conduct of the parties establish that historically the above-described unit has been recognized as an appropriate unit by the parties and the General Counsel has met his burden of establishing appropriate unit and exclusive representative status by this evidence.[4]

Accordingly, I find that the Union is and has been the exclusive collective-bargaining representative of Respondent's employees in an appropriate unit.

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[1] The complaint was amended at the hearing to reflect the correct name of Respondent: Edward Z. Holmes Detective Bureau, Inc.

[2] All dates are in 1979 unless otherwise stated.

[3] *Berbiglia, Inc.*, 233 NLRB 1476 (1977); *Morse Shoe, Inc.*, 227 NLRB 391 (1976).

[4] *Schuck Component Systems, Inc.*, 230 NLRB 838 (1977).

The 1976–79 contract signed by Respondent with the Union provided for a union-security clause, dues-checkoff clause, and a requirement that Respondent report to the Union the names, addresses, and social security numbers of newly hired employees within 30 days of their employment. The contract provides for payments to the Union's health and welfare fund, to be made by Respondent on or before the 5th day of each month for all full- and part-time employees who have completed their 30-day probationary period.

At some unspecified time after the 1976 contract was executed, Respondent, as admitted by Milton Tavlin, its president, began to fail to report new employees to the Union, and to fail to make welfare contributions for these employees. Tavlin admitted that as each employee that the Union had as a member left its employ his or her name was excised from the list reported to the Union, and that the name of the employee hired to replace that employee was not furnished to the Union, nor were welfare payments made on said employee's behalf to the Union. As of March 1979, Respondent employed 30 employees, including 7 or 8 part-time employees. At that time Respondent was reporting to the Union and making welfare payments on behalf of eight employees, which were all employees who had been employed when the Union originally was recognized by the Employer.[5]

On April 15, 1978, pursuant to a grievance filed by the Union, Herbert Haber, an arbitrator, was designated by the New York State Mediation Board to hear and decide whether Respondent violated the contract by its failure to notify the Union of new-hired employees and the refusal of Respondent to place the employees in the collective-bargaining unit, to supply the Union with the addresses of job locations, and to remit dues and initiation fees and welfare contributions to the Union.

The parties then requested a delay of the arbitration hearing pending settlement discussions and the arbitrator agreed not to set a hearing date pending a subsequent request by either party.

In February 1979, the Union advised the arbitrator that the matter remained unresolved and requested that a hearing be scheduled. After several phone conversations with the parties, Haber sent a letter to the parties dated February 27, confirming that a hearing was scheduled for April 10.

Sometime in March, Tavlin received a phone call from Daniel Cunningham, president of the Union. Cunningham began the conversation by asking Tavlin where his money was, and added that Cunningham wanted the money that was allegedly owed by Respondent to the Union.[6] Tavlin replied that he would take care of it as soon as he could and that he could not draw a check for something he did not have. He added that the first thing that he had to take care of was payroll. Cunningham, apparently skeptical of Tavlin's claim that he did not have the money to make the payments to the Union, said to Tavlin, "Who do you think you are talking to, those f—ing jigs that you got working for you?" Cunningham then added that he was going to put Respondent out of business.

Tavlin and Cunningham had four or five similar conversations, during the period between March 1979 and the date of the instant hearing, during which Cunningham on each occasion informed Tavlin that he was going to put him out of business.

In addition, on the first day of the instant hearing, May 5, 1980, Cunningham upon confronting Tavlin outside the hearing room herein, repeated his threat to put Tavlin out of business.[7]

On March 29, Tavlin sent a letter to the Union, advising it of Respondent's intention pursuant to the contract to amend, alter, or modify said agreement.[8]

The Union replied by letter dated April 3, confirming receipt of Respondent's letter requesting negotiations, and set April 11 or 12 at the Union's offices as the date for meeting. The letter requests that Tavlin confirm either of these two dates as soon as possible.

The letter also states as follows: "As you realize your failure to bargain in good faith is considered an unfair labor practice and will result in legal action being taken against you."[9]

The letter concludes by requesting, *again*,[10] a current list of employees' names, addresses, social security numbers, dates of hire, and/or terminations, and job locations.

Cunningham thereafter received a letter, dated April 9, from Peter Curley, Respondent's attorney, requesting that prior to the commencement of negotiations, that the Union forward copies of its proposals to him and his client.

The letter also refers to the fact that Curley would not be able to attend the arbitration scheduled for April 10, and that he had informed arbitrator Haber of such unavailability.

Curley contacted the arbitrator and obtained a postponement of the arbitration hearing to May 23.

The Union sent a letter, with proposals attached, signed by Cunningham to Curley, dated April 13. The letter reads as follows:

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[5] The complaint does not allege nor does the General Counsel contend that Respondent's actions, which still continue, of failing to report new employees to the Union, or failing to make contractual payments on their behalf to the Union, constitute independent violations of the Act.

[6] Referring to the welfare and dues payments.

[7] The above findings are based on the undenied testimony of Tavlin, which I credit. Cunningham, although called as a witness, did not deny making the above-cited remarks to Tavlin. Initially, he testified that he attempted unsuccessfully on numerous occasions to reach Tavlin on the telephone during 1979, but that Tavlin never returned his calls. On cross-examination he admitted that he had spoken to Tavlin on the phone on five or six occasions in 1979. However, Cunningham did not testify as to the substance of these conversations, nor did he deny or attempt to explain or justify the above described comments that he made to Tavlin.

[8] The contract provides that the agreement shall be deemed renewed from year to year, unless either notifies the other by mail at least 60 days before the expiration date of its desire to amend, alter, or modify said agreement.

[9] The record contains no explanation of what alleged "failure to bargain in good faith" Cunningham was referring to in this letter.

[10] Cunningham, prior to this letter being sent, had been informed by Respondent's employees, that Respondent was employing more than the eight employees it had been reporting to the Union. Cunningham therefore had requested the right to audit Respondent's books to check this matter out, and had been unsuccessful in arranging such an audit.

In response to your letter of April 9th, quite frankly it has only been brought to my attention that you are now representing the above company (Holmes Det. Bureau).

I also see that you are again picking up the leftovers by representing a company with which we had a great deal of trouble with in the past and that you, as usual, are using your usual stalling tactics concerning our usual arbitration procedures.

As requested, I am enclosing a copy of our new proposed Collective Bargaining Agreement since you have elected to represent Holmes. Apparently, what Holmes failed to tell you is that they have, now and in the past, completely ignored the basic terms of the Collective Bargaining Agreement and more importantly, they have been consistently in arrears not only on Welfare Contributions but in remittance of Dues and Initiation Fees. Also, they have never reported to us the true amount of employees as the contract specifies.

With respect to Bargaining, I assume their attitude will be basically the same and that is, to show little concern for the obligations imposed on them. However, I can assure you that it is our intentions to take every action possible against Holmes Detective Bureau that would protect both the integrity of this Union and the rights of the employees.

I believe I should receive a response from you within five (5) days of receipt of this letter which should be more than sufficient time for you to review the contract and to set a date for negotiations to commence.

Thank you for your anticipated cooperation.

On May 17, the Union sent the following letter to Respondent, with different proposals attached:

Holmes Detective Bureau
505 Fifth Avenue
New York, New York 10017

Attention: Mr. Milton Tavlin

Re: *Contract Renewal*

Dear Mr. Tavlin:

You have notified the union of your intention to renegotiate the contract that is about to expire and we have called and sent you letters concerning appointments for the purpose of negotiations. You have failed to reply with our request. Therefore, we send you the union's proposals for the new collective bargaining agreement.

Of course, you realize if you fail to comply this time, we shall immediately file charges and take whatever action is necessary to protect those employees covered under the collective bargaining agreement.

We also request from you a current list of all employee's names, addresses, social security numbers, date of hire and/or termination, location of employment and present rate of pay. Since you have informed us that you have an attorney representing you, we have also sent a copy of the proposals to him.

We also bring to your attention that you are consistently in arrears with respect to dues, initiation fees and Welfare contributions. We hereby ask that you confirm one of the below listed dates for the purposes of an audit of your records so as to determine what monies are due the union and Welfare Fund:

TUESDAY, MAY 29TH OR WEDNESDAY, MAY 30TH at 10:00 a.m.

You can confirm one of the above dates with our office and we will notify our accountant.

After reciting the Union's demands, the letter concludes by pointing out that Respondent has failed to comply with provisions of the contract currently in effect, and adding that Respondent's failure to comply with the Union's request for a meeting will result in the proper legal action to be taken.

The proposals of the Union furnished to Respondent on May 17 differ significantly from the proposals submitted in April. For example, on wages the Union's April proposals requested a wage increase of 30 cents per hour for each year of the 3-year contract, to be paid on June 6 of each year. Additionally, the April proposals called for a raise in the minimum salary to 35 cents per hour greater than the Federal or state minimum wage, whichever is higher, and a minimum hiring rate for armed guards of $4.50 per hour.

The May proposals of the Union requested raises of 50 cents per hour for employees immediately and a 35-cent-per-hour increase after 6 months. Further, the minimum rate requested was 40 cents per hour over the minimum wage, plus a 25-cent-per-hour increase after 30 days of employment. With respect to armed guards, the minimum hiring rate of $4.50 was not changed from the Union's prior proposals, but the Union added a demand for 75-cent-per-hour increases for armed guards for each year of the contract.[11]

With respect to the May proposals of the Union, they also provided for significant differences from the April proposals in such areas as welfare payments, sick leave, holidays, and vacations.[12]

[11] The prior contract between the parties provided for no guaranteed raise in the first year of that contract but only that if the Federal or state minimum wage was raised, the minimum wages of Respondent's employees would be increased by 15 cents per hour above the Federal or state minimum wage. The agreement provided for a 10-cent-per-hour increase on June 6, 1977, and 1978, and a minimum hiring rate for armed guards of $3.50 per hour.

[12] For example the welfare payments provided for in the April proposals were $40, $50, and $60 per month for full-time employees over 3 years, and $20, $25, and $30 for part-time employees. The May proposals provided for payments of $55, $65, and $75 for full-time employees and $25, $35, and $45 for part-time employees. The rates in the expired contract were $20, $21, and $22 for full-time employees and $10, $11, and $12 for part-time employees.

On May 23, neither Respondent nor its attorney appeared at the arbitration hearing scheduled before Arbitrator Haber. The arbitrator waited for an hour and attempted to reach Respondent and its attorney without success. He therefore conducted the hearing without the presence of Respondent or its representative. On May 29, Haber sent a letter to Respondent and Curley, setting forth that they did not appear at the hearing and that the hearing was conducted and testimony and evidence was received. The letter added that Haber intended to issue an award on or about June 15, but would hold the matter open to afford Respondent an opportunity to contact him in regard to this matter.

On July 17, Haber issued his award, setting forth the above facts with respect to Respondent's failure to appear and adding that Respondent did not contact him by June 10.

In his award, the arbitrator set forth various provisions of the contract concerning dues checkoff, welfare fund, the obligation of Respondent to furnish the Union with addresses of jobsites and to report newly hired employees to the Union. These provisions were accurate recitations of the provisions in the contract.

However, the arbitration clause cited in the arbitrator's decision does significantly differ from the actual arbitration clause in the contract in existence between the parties.

The contract between the parties provides:

ARTICLE VII

GRIEVANCES AND ARBITRATION

Article 7.1 All complaints, disputes, and grievances arising between the parties to this Agreement, except as to no-remittance of dues, initiation fees and Welfare Fund contributions, which may be sued for directly in a Court of competent jurisdiction, at the option of the Union, involving questions of interpretation or application of any clause of this Agreement, or any act or conduct in relation thereto, directly or indirectly, shall be presented by the party asserting a grievance to the other party. Both parties shall thereupon attempt to adjust the dispute, and if no adjustment can be arrived at within forty-eight (48) hours, the matter shall be submitted for arbitration to the New York State Board of Meditation/Federal Mediation and Conciliation Service, one of whose staff members shall arbitrate the same upon the request of either party.

Article 7.2 Where a dispute is submitted for arbitration, such action shall be considered a final and binding submission by both parties hereto. Thereafter, should either of the parties fail to attend the hearing set by the Arbitrator, after due notice thereof, the Arbitrator shall be empowered to proceed with the hearing in the absence of either party, and shall be empowered to render a final decision and award. The decision of the Arbitrator shall be made in writing and shall be final and binding upon the parties hereto. Employee witnesses shall suffer no loss in pay for appearances at arbitration hearings.

Article 7.3 The cost of such arbitration shall be borne equally, by the Employer and the Union.

The clause cited by the arbitrator reads as follows:

ARTICLE II—GRIEVANCES AND ARBITRATION

Article 7.1 All complaints, disputes, and grievances arising between the parties to this Agreement, involving questions of interpretation or application of any clause of this Agreement, or any act or conduct in relation thereto, directly or indirectly, shall be presented by the party asserting a grievance to the other party, and if no adjustment can be arrived at within forty-eight (48) hours, the matter shall be submitted for arbitration.

Article 7.2 Where a dispute is submitted for arbitration, such action shall be considered a final and binding submission by both parties hereto. Thereafter, should either of the parties fail to attend the hearing set by the Arbitrator, after due notice thereof, the Arbitrator shall be empowered to render a final decision and award. The decision of the Arbitrator shall be made in writing and shall be final and binding upon the parties hereto.

Article 7.3 The cost of such arbitration shall be borne equally, by the Employer and the Union.

Cunningham testified that he gave the arbitrator an original and a copy of the actual contract in existence between the parties. I do not credit Cunningham and find that he intentionally and knowingly submitted to the arbitrator a contract containing an arbitration clause different from the contract actually in existence between the parties. I found Cunningham to be a most argumentative, evasive, and contradictory witness, whose testimony I found to be on the whole unworthy of belief. In this regard, initially, he testified that both the proposals that he sent to the Employer were identical, and only admitted when confronted with the documents on cross-examination that these were in fact two different sets of proposals sent to the Employer. As noted above, on direct examination, he testified that he called Tavlin on numerous occasions and that Tavlin never returned his calls. On cross-examination, however, he admitted that he had spoken to Tavlin on the phone five or six times. In addition his testimony as to what Business Agent Jaffe reported to him about Jaffe's July meetings with Tavlin, to be discussed below, differed substantially from the versions of these meetings as testified to by Jaffe.

Moreover, I find it inherently improbable that the arbitrator could have obtained the incorrect copy of the contract, other than by virtue of having been given same by the Union. The difference in the clauses are quite significant, in that the actual clause arguably deprives the arbitrator of jurisdiction to hear the case. I also rely upon the Union's failure, after the award issued, to move to reopen the hearing or to correct the arbitrator in his alleged mistake in quoting the arbitration clause, as further evidence that the Union intentionally substituted the in-

correct clause in the document that it submitted to the arbitrator.

The arbitrator, based on Cunningham's testimony, found that Respondent failed to provide it with a list of jobsites, failed to report newly hired employees, has accordingly been remiss in deducting and remitting dues and initiation fees of these employees and has likewise failed to make contributions to the union health and welfare fund.

He found that Respondent had therefore violated various sections of the contract and issued the following award:

AWARD

1. The Employer is in violation of the Collective Bargaining Agreement by its failure and refusal to notify the Union of new hirings of employees and through its refusal to place the employees in the bargaining unit and the Employer is ordered to commence advising the Union of such hires and to place these employees in the bargaining unit effective with the date of this Award.

2. The Employer is in violation of the Collective Bargaining Agreement by its failure and refusal to supply the Union with the addresses of job sites and the Employer is ordered to commence providing such job site information to the Union effective with the date of this Award.

3. The Employer is in violation of the Collective Bargaining Agreement by its failure and refusal to remit dues, initiation fees and welfare contributions and the Employer is ordered to commence remitting dues, initiation fees and welfare contributions on a current and future basis effective with the date of this Award.

4. The Employer is liable for the initiation fees, dues and welfare contributions for all employees covered by this agreement who have been in his employ during the term of this contract, and shall make available for audit by the Union those employment records that are required to ascertain the amount of money due the Union under the contract for those employees.

5. The undersigned shall retain jurisdiction over this matter to determine the amount of fees and expenses incurred by the Union in ascertaining or collecting the payments owing under this Award.

6. Under its contract liability to share equally with the Union in the costs of an arbitration and pursuant to the provisions of Section 7513 of the CPLR, the Employer is hereby ordered to reimburse the Union the sum of $400.00 which is one-half the total cost of the Arbitrator's fees and expenses in the instant matter.

DATED: July 17, 1979

On June 5, the Union sent the following letter to Respondent:

Re: Contract Renewal

Dear Mr. Tavlin:

Since you have repeatedly refused to return my phone calls placed to you on the following dates: May 21, 24, 28, 30, June 1, 4, concerning a meeting for the purposes of negotiations and your refusal to respond to my letter of May 17th concerning contract renewal proposals, we have no alternative but to file charges at the NLRB immediately.

We also requested from you an appointment in which to perform an audit of your records and you have failed to confirm or comply with the two dates indicated in my letter of May 17th. As you realize, we have filed for an arbitration and you failed to appear on the date scheduled for the arbitration. We will, therefore, request that the Arbitrator's Award be enforced in a court of law. We have informed your attorney of our intentions and he, too, has failed to respond to us. We must assume, therefore, that you have no intentions of meeting with us or complying with the law with respect to collective bargaining.

For the record, we again ask that you send us a list of all employees, their location of employment and date of hire and/or termination and also that you contact us immediately upon receipt of this letter so that we can set a mutual convenient date for the purpose of meeting on the negotiations.

Very truly yours,
Daniel Cunningham
International President

On June 7, the Union filed a charge in Case 2-CA-6502 against Respondent, alleging violations of Section 8(a)(1) and (5) of the Act by failing to bargain with the Union for a new contract and by failing to comply with the terms of the present contract and by discriminating against new employees by failing to pay them union wages and benefits.

On June 27, Tavlin sent a letter to the Union, requested a negotiation meeting for July 11 at Tavlin's office. On June 29, the Regional Director approved the request of the Union to withdraw its charges.

On July 11, as scheduled, a meeting was held in Tavlin's office. Present were Union Business Representative Herman Jaffe, and Tavlin on behalf of Respondent. The Union's May proposals were discussed by the participants. Tavlin responded by stating that he would not sign a new contract that included part-time employees. Tavlin also stated that he could not afford to make any welfare payments, and added, "there's no sense in even signing an agreement with the Union because I would just fall behind again. I would just get into a deeper hole." Tavlin continued that he wished to reduce the number of holidays currently in existence for his employees, from nine to six.

Tavlin also stated that he could not afford any wage increases, and in discussing why he could not afford any increases and why he could not make any welfare payments, informed Jaffe of warrants that had been levied against him by the Internal Revenue Service for nonpay-

ment of sales and withholding taxes. Tavlin also showed Jaffe these warrants.[13]

Jaffe, after being shown these warrants, commented to Tavlin that perhaps the Union could put the welfare payments "on the back burner" for 2 years and then in the third year, get together and see if things had improved.[14]

On July 18, Tavlin and Jaffe met again at Respondent's premises. Jaffe began the meeting by reporting to Tavlin that the Union could not agree to putting all the welfare payments on the "back burner," as had been mentioned in the prior meeting. Tavlin reiterated the positions that he had taken at the July 11 meeting, including no part-timers in the unit, eliminating all welfare payments, and no wage increases.

Jaffe testified, in response to a leading question by the General Counsel, that in view of Tavlin's comments that he could not afford any raises, he told Tavlin that the Union's accountant would visit his office in order to audit his books and verify his claims. I credit Tavlin's denials, and find that Jaffe made no oral request of him that the Union's accountant be permitted to audit his books, or to supply the Union with any records, or information.

On July 30, the Union sent the following letter to Respondent:

Mr. Milton Tavlin
Holmes Detective Bureau
505 Fifth Avenue
New York, New York

Dear Mr. Tavlin:

Enclosed you will find a copy of the arbitrator's bill. You will note that since the arbitrator had great difficulty in reaching you, the union was forced to pay the entire amount and the Award will state that you are to reimburse us for your share.

We hereby demand that you forward to us immediately upon receipt of this letter the sum of $400 made payable to ALLIED SECURITY HEALTH AND WELFARE FUND.

We also remind you that we have held two past meetings with you concerning negotiations for a new collective bargaining agreement in which negotiations proved fruitless. We now demand that you meet with us at our office (245 Great Neck Rd., Great Neck, N.Y.) on August 6th at 10:00 a.m. for the purpose of completing whatever negotiations were started. Your failure to appear will result in papers being filed against you and additional litigation through whatever agencies or departments necessary.

We also would like to set a date for the purpose of examination of records pursuant to the Arbitrator's Award. Your failure to comply will result in our going to court for enforcement of this award.

On August 3rd our accountant will be at your office for the purpose of examination of records. Please have available the following:

1. Cash disbursement book
2. Weekly payroll registers
3. Quarterly earnings summaries
4. List of names, addresses, social security numbers, job sites
5. Payroll tax reporting forms (specifically Form 941)
6. General ledger

We ask that you confirm this upon receipt of this letter; otherwise, our accountant will be there.

This letter is being sent both certified and regular mail.

Very truly yours,
Daniel Cunningham
International President

Although the letter indicates that the union accountant would be at Respondent's office on August 3, for the audit, he did not appear at that time or any other time.

On August 10, the Union sent another and final written communication to Respondent, reading as follows:

August 10, 1979

Holmes Detective Bureau
505 Fifth Avenue
New York, N.Y. 10017

Gentlemen:

We have made repeated request of you to comply with the terms and conditions of the Collective Bargaining Agreement with respect to *Dues Payments & Initiation*. This notice will inform you that you are *currently in arrears* and we request the following:

1. A list of all employees, addresses, dates of hire or termination, status (full or part time) and job site, along with the proper contribution on behalf of those employees.
2. A date to perform and audit as follows:

DATE 8/27/79 DAY Monday OR DATE 8/28/79 DAY Tuesday for covered employees as stated in the Collective Bargaining Agreement.

Please have available the following records:

(a) Cash Disbursement book

(e) list of names and addresses,

[13] Tavlin admitted on cross examination, however, that during the period March through July that he expanded his business 50 percent by adding 8–10 new customers, and that he had a similar unpaid balance to the IRS since 1973.

[14] The above is based primarily on Tavlin's version of this meeting, whom I found to be a more credible and believable witness than Jaffe. Jaffe testified that he went over with Tavlin the Union's April demands, rather than its May demands, and he did not recall making remarks about putting the welfare payments on the "back burner." Other than these areas, Jaffe's version of the meeting was essentially in accord with Tavlin's testimony.

(b) Weekly payroll registers S.S.#, location of employment
(c) Quarterly earnings summaries of all employees
(d) General Ledger
(f) Payroll tax reporting forms (Specifically Form 941)

You realize your failure to comply with the Terms and Agreements of the Collective Bargaining Agreement will *subject* you to whatever *economical and legal* sanctions available to us by law.

Very truly yours,
Daniel Cunningham
International President

On September 10, the charge in the instant case was filed and was amended on October 2. The complaint issued on October 26.

Sometime prior to December 5, Tavlin sent a letter to the Union requesting an additional negotiation session to be held on December 5.[15]

On December 5, a meeting was held at Respondent's premises, attended by Tavlin, Cunningham, and Frank Salvatto, union business representative. Salvatto sat down, but Cunningham did not. Talvin asked Cunningham three times to sit down, but Cunningham refused. Salvatto read off rapidly the Union's proposals. After Salvatto concluded, Cunningham said to Tavlin, "Are you going to sign a contract on those terms." Cunningham continued, "Well in other words, you don't want to sign it." Cunningham and Salvatto then turned around and left.[16]

There have been no further meetings or other contacts between the parties with respect to negotiations.

On February 8, 1980, the Union filed an additional charge against Respondent, in Case 2-CA-17076, alleging that since on or about October 1, 1979, Respondent has refused to bargain collectively with the Union. The Regional Director approved the withdrawal of this charge on February 20, 1980. Cunningham when asked why he withdrew these charges, replied, "we had certain issues pending in arbitration, and we found we could accomplish the same end result through the arbitration."

The record does not establish the precise status of the arbitration award, issued by Arbitrator Haber in July. It is admitted that Respondent has not complied with any aspect of the award, including the order to supply certain information to the Union. It was agreed by the attorneys for the Charging Party and Respondent that a proceeding to confirm the award was instituted, but they differed as to whether the award had been confirmed by any court. Since no probative evidence was adduced to the contrary, I find that insofar as this record is concerned, the Union's arbitration award has not as yet been confirmed.

B. *Analysis*

The General Counsel contends that Respondent's conduct indicated that it did not have any intention of entering into good-faith bargaining for a new contract with the Union. The record contains substantial evidence in support of such a contention.

Thus, Respondent, after having unilaterally decided to apply the prior contract only to employees who were original members of the Union when recognition was granted in 1973,[17] adamantly insisted, in the bargaining for new contract, on the fact that any new contract signed must apply only to full-time employees, and that part-time employees who had previously been part of the unit would no longer be covered. Such conduct, requiring the Union to cede a portion of its exclusive representative status, is nothing but a brazen attack on the basic tenet which underlays the parties' years of bargaining, and has been held by the Board to be a flagrant attempt to denigrate the Union, and so demonstrably antithetical to the bargaining principle as to constitute a defiant breach of Section 8(a)(5).[18] In addition, Respondent's proposals to eliminate welfare coverage entirely, and to reduce the number of holidays, along with its above-described insistence on eliminating part-time employees from the unit, were predictably unacceptable to the Union,[19] as it is well settled that an employer has not met its statutory obligation by insisting on demands which do not have the slightest chance of acceptance by a self-respecting union.[20]

Moreover, the statement made at negotiations by Tavlin, that there is no sense in signing an agreement with the Union, is also highly indicative of Respondent's lack of good faith and sincere desire to reach agreement with the collective-bargaining representative of its employees.[21]

However, notwithstanding the above evidence, the Board has held that:

> The test of good faith in bargaining that the Act requires of an employer is not a rigid but a fluctuating one, and is dependent in part upon how a reasonable man might be expected to react to the bargaining attitude displayed by those across the table. It follows that . . . a union's refusal to bargain in good faith may remove the possibility of negotiation

[15] I credit Tavlin's testimony that he initiated this meeting, over Cunningham's testimony that the meeting was arranged as as result of Cunninghams's phone call. In addition to my general assessment of this finding, I find that Cunningham failed to mention this December meeting in his direct testimony, and only reluctantly admitted its existence on cross-examination.

[16] The above recitation of the events of this meeting is primarily based on Tavlin's credited version. I reject and do not credit Cunningham's testimony that Tavlin said that he would not negotiate with the Union and that he could get another year and a half out of it before the Board issues an Order. As noted above, I have found Cunningham's testimony to be generally unworthy of belief.

[17] Although as noted, the General Counsel has not alleged and I do not find that such conduct constitutes independent violations of the Act, I can and do assess such conduct in evaluating the good faith of Respondent at the bargaining table.

[18] *Romo Paper Products Corp.*, 220 NLRB 519 (1975).

[19] *Bartlett-Collins Company*, 230 NLRB 144 (1977).

[20] *N.L.R.B. v. Reed & Prince Manufacturing Company*, 205 F.2d 131, 139 (1st Cir. 1953), cert. denied 346 U.S. 887; *Romo Paper, supra.*

[21] *Berbiglia, supra; Schuck, supra.*

> and thus preclude the existence of a situation in which the employer's own good faith can be tested. If it cannot be tested, its absence can hardly be found.[22]

In my judgment, the conduct of the Union in the instant case rises to the level of sufficient bad faith, so as to preclude the existence of a situation in which Respondent's good faith can be tested. I rely on a number of factors in reaching such a conclusion, but I place principal emphasis on Cunningham's statements to Tavlin, repeated on five or six occasions, commencing in March, prior to any bargaining, and continuing until the date of the hearing, that the Union intended to put Respondent out of business. Cunningham's expressed hostility to Respondent and his stated purpose to destroy Respondent financially made any attempt at good-faith bargaining a futility.[23]

A union must have a single-minded interest of protecting and advancing the interests of employees who have selected it as a bargaining agent and there must be no ulterior purpose.[24] The statements made by Cunningham, in my view, establish that the Union herein might conceivably be entering bargaining with such an ulterior purpose (i.e., the driving Respondent out of business). These remarks of Cunningham "have created a situation which would drastically change the climate at the bargaining table from one where there would be reasoned discussion in a background of balanced bargaining relations upon which good faith bargaining must rest to one in which, at best, intensified distrust of the Union's motives would be engendered."[25]

The Union's lack of concern for the interests of the employees, whom it purportedly represents, is further demonstrated by Cunningham's racially inflammatory and abusive reference to them as "fucking jigs," in the course of his discussions with Tavlin.

Moreover, the Union's conduct at the bargaining table serves to reinforce Cunningham's statements and tends to show that the Union had little if any real interest in reaching an agreement with Respondent. In fact the evidence reveals that the Union's primary concern in pursuing bargaining with Respondent was to collect the back welfare and dues payments, which Respondent owed it under the expired contract. Thus, the primary emphasis of most of the letters sent by the Union to Respondent dealt with the Union's efforts to collect this money due and to arrange for an audit of Respondent's books and records for this purpose. In fact, the last letter sent by the Union to Respondent, dated August 10, made no reference to negotiations or to an attempt to set up a new meeting, but merely set forth an additional request for an audit. There is no evidence of any subsequent requests by the Union for negotiations, and in fact the only other meeting that occurred, on December 5, came at the behest of Respondent.[26] At this meeting, Cunningham refused to even sit down, had the Union's demands read off rapidly by Salvatto, and after Tavlin stated that he would not sign the Union's proposed agreement, the union officials immediately turned and walked out without making any effort to engage in meaningful bargaining. This conduct of the Union shows scant interest in reaching an agreement, and if anything, shows the Union exhibiting a take it or leave it attitude, by insisting on an agreement only on its own terms. Such conduct is indicative of bad faith on the part of the Union, which has been held to be sufficient to preclude a test of Respondent's good faith.[27]

I also find that the Union, by substantially escalating its demands, in its May proposals from its April proposals, tended to prolong the negotiations and is a further indication of the Union's bad faith.[28]

Finally, I also rely on the Union's actions at the arbitration proceeding. I find that the Union's submission to the arbitrator of an arbitration clause which is significantly different from the clause included in the contract between the parties is further evidence of the Union's bad faith in its dealings with Respondent.[29]

Accordingly based on the above-cited factors, I conclude that the Union's conduct herein has removed the possibility of negotiation and precluded the existence of a

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[22] *Times Publishing Company, Evening Independent, Inc., News Printing, Inc.*, 72 NLRB 676, 683 (1947).

[23] *N.L.R.B. v. Kentucky Utilities Company, Inc.*, 182 F. 2d 810 (6th Cir. 1950), cited with approval by the Board in *Deeco, Inc.*, 127 NLRB 666 (1960); *Signal Manufacturing Co.*, 150 NLRB 1162 (1965).

[24] *Bausch & Lomb Optical Company*, 108 NLRB 1555 (1954).

[25] *Bausch & Lomb, supra* at 1561. See also *Harlem River Consumers Cooperative, Inc.*, 191 NLRB 314 (1971).

[26] I note in this connection that the Union filed an additional charge against Respondent on February 8, 1980, alleging a refusal to bargain with the Union. Cunningham testified that he withdrew the charge in order to pursue his claims through the arbitration process. This further supports my conclusion that the Union's main interest in its dealings with Respondent was to collect the back dues and welfare payments allegedly due from Respondent and that it had little if any interest in obtaining a contract with Respondent.

[27] *Continental Nut Company*, 195 NLRB 841 (1972); *Roadhome Construction Corp.*, 170 NLRB 668 (1968); *Otto Klein, Edna Klein, Stephen Collins, Louise Chancy, Margaret Beaudoin and Robert Gilfallen, as Trustee, a Co-Partnership, d/b/a Artiste Permanent Wave Co.*, 172 NLRB 1922 (1968).

[28] *Artiste Permanent Wave, supra.* I note in this regard particularly the Union's welfare proposals. Respondent herein had consistently been behind in its welfare payments and had claimed to the Union that it could not afford to make such payments promptly. Yet the Union made an original demand of an increase of over 100 percent of the amounts then being paid ($40, $50, and $60 per month from $20, $21, and $22 per month for each year), and then a month later escalated its demands nearly another 100 percent to $55, $65, and $75 per month. Although it is true that the Union was only making demands, and that it could and probably would come down from these figures during negotiations, this sharp escalation of the Union's demands in this critical area to Respondent, it seems to me, did not demonstrate to Respondent, on the part of the Union, a sincere desire to reach agreement.

[29] It is true, as pointed out by counsel for the Charging Party, that the contract in existence between the parties can be read as giving the Union the option of proceeding to arbitration on this type of dispute. Thus, it may very well be that the arbitrator, even if he would have had the actual contract in front of him, would have asserted jurisdiction over the matter and issued his decision as he did. However, it is my belief that the clause is sufficiently ambiguous, that I am persuaded as noted above, that the Union intentionally submitted an incorrect clause, so as to eliminate consideration by the arbitrator of a possible crucial issue of jurisdiction to the Union's bargaining activities, does in my judgment bear on the Union's good faith in its overall dealings with Respondent, and can be considered in evaluating whether the Union's conduct precluded a testing of Respondent's good faith.

situation in which Respondent's own good faith can be tested.[30]

The complaint also alleges that Respondent has violated Section 8(a)(1) and (5) of the Act by refusing to provide information to the Union, which information is necessary and relevant to the Union's performance as the exclusive bargaining representative of its employees. The evidence establishes that the Union sent numerous letters to Respondent requesting various items of information and records, all clearly relevant to the Union's performing its function of determining the accuracy of Respondent's compliance with various aspects of the contract.[31]

Although the evidence does not esbablish that Respondent ever made an outright refusal to supply this information, its failure to respond to the letters is sufficient to establish a refusal to supply the information requested.[32]

However, I am of the opinion that the principles of *Times Publishing, supra*, are equally applicable to this violation as well, and that the Union's conduct as described above has also precluded a testing of Respondent's failure to supply the information requested by the Union. In this connection, I note particularly that the threats to drive Respondent out of business made by Cunningham to Tavlin, were made in the course of discussions they were having pertaining to Respondent's alleged failure to comply with its contractual obligations, which motivated the requests for information made by the Union.[33] A union that threatens to drive an employer out of business should not be permitted access to an employer's customer lists or payroll registers, as it is not conducive to collective bargaining, to impose upon Respondent the difficult burden of disentangling the Union's motives. *Bausch & Lomb, supra.*

Although *Bausch & Lomb* applied the rationale of *Times Publishing, supra*, to a situation where the Union was engaged in a competing business with the Employer, I believe that the principles expressed therein are applicable to the case at bar. In fact, the instant case presents an even stronger situation for the application of the reasoning expressed in *Bausch & Lomb.* Thus in *Bausch & Lomb*, the Board noted that if a union should make exorbitant demands upon an employer for the purpose of driving an employer out of business so that a competitor would be benefited, it would constitute bad-faith bargaining. The Board without any evidence that the union in *Bausch & Lomb* would or did make such exorbitant demands, or made any statements or engaged in any conduct indicating a desire to drive the employer out of business, nevertheless disqualified the union from bargaining with the employer, because of the mere possibility of such conduct in the future by the union by virtue of its ownership in a competing business. In the instant situation, the Union has in fact made statements on five or six occasions that it intends to drive Respondent out of business, thereby demonstrating in my judgment, more persuasively than the union in *Bausch & Lomb*, the absence of fair dealing with Respondent, sufficient to preclude a testing of Respondent's obligation to supply information to the Union, as well as its obligation to bargain in good faith with the Union.

The General Counsel also alleges in his brief, although not specifically alleged in the complaint, that Respondent has violated Section 8(a)(1) and (5) by refusing to permit the Union to audit its books, in order to substantiate its claim that it could not afford the union proposals.[34]

Without deciding whether the complaint is broad enough to encompass such a finding, or whether this issue was fully litigated, I find the allegation to be clearly without merit. I have found, above, that Jaffe made no oral request to Tavlin to produce his books in order to substantiate his claim of inability to afford the Union's demands. The record contains no other evidence of any demand by the Union to compel Respondent to produce his books to support its claims that it could not afford the Union's proposals. The General Counsel's assertion that the Union's letters and requests to audit Respondent were following up Jaffe's oral demand for an audit, in response to such a claim by Tavlin, is totally unsupported by the record. The letters make no reference to any oral demand of Jaffe, nor do they refer to any claim of Respondent of inability to afford the Union's proposals. It is clear that the Union's letters and its requests for an audit of Respondent's books were solely in connection with the Union's attempts to collect the money allegedly owed them by Respondent under the collective bargaining agreement, and in connection with the enforcement of the arbitrator's award ordering Respondent to make such payments.

In any event, even if it were to be found that Respondent did refuse the Union's request for an audit in part made by the Union in order to substantiate Respondent's claims of inability to afford the union demands, I would find for the reasons set forth above, that the Union's conduct has precluded a testing of Respondent's obligations in this regard as well.

Respondent alleges that the entire complaint should be dismissed under the principles of *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955). Clearly the only aspect of the complaint, potentially cognizable under *Spielberg*, is the refusal-to-supply-information allegation.

However, a review of the arbitration proceedings reveals that the award touched only tangentially upon Respondent's obligation to furnish information to the Union. Thus, in lieu of resolving the substantive issue of Respondent's duty to furnish information, the arbitrator treated the Union's request as a matter of compliance with the terms of the award. This award does not resolve the unfair labor practice issues which the Board is called upon to decide, and the award is therefore not

[30] *Times Publishing, supra; Continental Nut, supra; Roadhome Construction, supra; Artiste Permanent Wave, supra*; cf. *Kentucky Utilities, supra; Bausch & Lomb, supra.*

[31] *Ellsworth Sheet Metal, Inc.*, 224 NLRB 1506 (1976); *Murray Bagdasarian d/b/a Michael Rossi Carpet Co.*, 208 NLRB 748 (1974).

[32] *Ellsworth, supra.* It is also noted in this regard that Tavlin admitted in his affidavit that he has not complied with the Union's request for an audit.

[33] In addition the Union's conduct as noted above, of submitting an incorrect contract in the arbitration which dealt directly with the matters set forth in the request for information, is particularly relevant to establishing the Union's lack of fair dealing in connection with the information requests of the Union.

[34] *N.L.R.B. v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956).

controlling herein.[35] I therefore do not believe that deferral to the award under *Spielberg* is warranted, as urged by Respondent.[36]

However, as noted above, I have found that the conduct engaged in by the Union constituted sufficient evidence of bad-faith dealing with Respondent, so as to preclude the testing of Respondent's obligation to bargain in good faith with the Union, including its obligation to supply information to the Union. Accordingly, I find that, therefore, Respondent has not violated Section 8(a)(1) and (5) of the Act based on the evidence of record herein, and I shall recommend dismissal of the complaint in its entirety.

[35] *The Kroger Company*, 226 NLRB 512 (1976).

[36] But cf. *Malrite of Wisconsin, Inc.*, 198 NLRB 241 (1972); *Southwestern Bell Telephone Company*, 212 NLRB 396 (1974).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, the Union has been and is the exclusive representative for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment of the employees of Respondent in the following appropriate bargaining unit:

> All full-time and part-time security employees employed by Respondent, exclusive of office clerical employees, non-guards and supervisors as defined in the Act.

4. Respondent has not violated the Act as alleged.

[Recommended Order for dismissal omitted from publication.]